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IN THE

Supreme Court

OF THE

United States.

OCTOBER TERM, 1912
No. 598

BUTTE & SUPERIOR COPPER MINING COMPANY, Limited, a corporation,

(Defendant) Appellant,

v.

CLARK-MONTANA REALTY COMPANY, a corporation, and ELM ORLU MINING COMPANY, a corporation,

(Plaintiffs) Appellees.

Reply Brief of Appellees on Motion to Dismiss Appeal.

JOHN P. GRAY,
W. A. CLARK, JR.,
JOHN L. TEMPLEMAN,
Counsel for Appellees.

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(Plaintiffs) Appellees.

Reply Brief of Appellees on Motion to Dismiss Appeal.

Some fundamental errors in the brief of appellant in opposition to the motion to dismiss require reply.

The brief disregards the allegations of the complaint and throughout an attempt is made to interject into the case questions for the first time presented in the answer of appellant or in the subsequent proceedings for the purpose of developing or attempting to develop a Federal question.

I.

On pages 10 and 11 of the brief of appellant, are stated seven questions which it is claimed are questions of law involving the construction or application of the Constitution or laws of the United States. We answer them in the order in which they appear:

"(1) *Whether, under Section 2324, R. S., the noncompliance with a Territorial statute as to notice of location (Montana Extra Session Laws,* 1873, *p.* 83, *Appendix I, this brief), avoids the attempted locations of the Elm Orlu and Black Rock.*"

It is assumed by appellant's counsel, in the argument of this as in the argument of other questions presented, that the location of the Elm Orlu claim of plaintiff was originally void. The complaint does not so allege. The complaint sets forth the facts with reference to the location and a copy of the location notice of the Elm Orlu, as also of the Black Rock. The plaintiffs (appellees) always maintained that the location of the Elm Orlu was valid and the location notice substantially complied with the laws of the then Territory of Montana; that the locators of the Black Rock had actual knowledge of the location of the Elm Orlu prior to the location of the Black Rock, and that, as a matter of fact, the Elm Orlu was prior, and such was the opinion of both of the courts below.

Defendant (appellant) did contend that the location was void. This contention was advanced, however, by the answer and was based upon a construction which it asked be given to a certain statute of the legislature of the Territory of Montana, and which is printed in full as Appendix I in the brief in opposition to the motion to dismiss.

The question of the validity of that location was a mixed question of law and fact. Even under defendant's (appellant's) contention and under its answer, it did not involve a construction of any mining statute of the United States; it involved only a construction of a statute of the Territory of Montana.

The complaint did not disclose what controverted construction of any law of the United States exists which affects the asserted rights of the plaintiff.

Throughout appellant's brief, it is assumed that the statute of a territory or state supplementary to the Federal mining act is of such character that it is incorporated into the body of the Federal mining law, and that the determination and meaning or effect of such state statute upon a mining location in some manner thereby presents a Federal question. Our answer to appellant's position is:

First: The complaint alleges, with reference to the location of the Elm Orlu lode claim, all of the facts which are essential to the location of a mining claim under the provisions of Section 2324 of the Revised Statutes;

Second: If, under the allegations of the complaint, any question is presented as to the validity of the location of the Elm Orlu claim under Sec. 2324, or any of the other sections of the mining law, it presents simply a question of fact as to the discovery of a vein of mineral bearing rock in place within the claim; the time of the discovery; the location or marking of the claim on the ground, or any other similar question of fact, and such questions do not present a Federal question.

Shoshone Min. Co. v. Rutter, 177 U. S. 505-509.

In the above case, the court said on page 509:

> "Inasmuch, therefore, as the 'adverse suit' to determine the right of possession may not involve any question as to the construction or effect of the Constitution or laws of the United States, but may present simply a question of fact as to the time of the discovery of mineral, the location of the claim on the ground, or a determination of the meaning and effect of certain local rules and customs prescribed by the miners of the district, or the effect of state statutes, it would seem to follow that it is not one which necessarily arises under the Constitution and laws of the United States."

It is argued that the Rutter case was a surface adverse suit. The answer is found in

> *Montana Ore Purchasing Co. v. Boston & M. Consol. Copper & Silv. M. Co.* (Mont.), 70 Pac. 1114,

where it is held:

> "In actions to determine adverse claims to patented mining claims, questions concerning conflicting extralateral rights are similar in their nature to those adjudicated in actions to determine adverse claims to surface rights, and are governed by the same principles."

Third: If, as claimed by counsel for appellant, it presented for determination the construction to be given to a state statute of Montana supplemental to the Federal mining act, that does not involve "a matter in controversy * * * (which) arises under the constitution or laws of the United States." This court has expressly so held in

> *Shoshone Min. Co. v. Rutter, supra,*

where, on page 508, it says:

> "The adverse suit, Rev. Stat. sec. 2326, is 'to determine the question of the right of possession.' That right may or may not involve the construction or effect of the Constitution or a law or treaty of the United States. By sections 2319, 2324, and 2332, Revised Statutes, it is expressly provided that this right of possession may be determined by 'local customs or rules of miners in the several mining districts, so far as the same are applicable and not inconsistent with the laws of the United States;' or 'by the statute of limitations for mining claims of the state or territory where the same may be situated.' So that in a given case the right of possession may not involve any question under the Constitution or laws of the United States, but simply a determination of local rules and customs, or state statutes, or even only a mere matter of fact.
>
> The recognition by Congress of local customs and statutory provisions as at times controlling the right of possession does not incorporate them into the body of Federal law. Section 2 of article I of the Constitution provides that the electors in each state of members of the House of Representatives 'shall have the qualifications requisite for electors of the most numerous branch of the state legislature,' but this does not make the statutes and constitutional provisions of the various states in reference to the qualifications of electors parts of the Constitution or laws of the United States.
>
> On August 8, 1890, Congress enacted (26 Stat. at L. 313, chap. 728) that intoxicating liquors transported into any state or territory 'shall upon arrival in such state or territory be subject to the operation and effect of the laws of such state or territory,' etc., and in *Re Rahrer*, 140 U. S. 545, 561, sub nom. *Wilkerson v. Rahrer*, 35 L. ed. 572, 576, 11 Sup. Ct. Rep. 865, 869, this court said:

> 'Congress has not attempted to delegate the power to regulate commerce, or to exercise any power reserved to the states, or to grant a power not possessed by the states, or to adopt state laws.' "

The attempt to distinguish the above case on page 16 of the brief of appellant, does not meet the language of this court above cited. In undertaking so to distinguish, the learned counsel for appellant, used the following language, referring to the Rutter-Shoshone case:

> "The court was construing a question involving construction or effect of Federal law, with a question merely involving the 'determination of a state statute,' i. e., what state law was in force or what it meant."

So, if in this case, the complaint presented for determination any question with respect to the Montana statute, it was in the language of counsel, "what it meant," and the court below has given to it a construction as to "what it meant."

"(2) *Whether, under Section 2332, R. S., a 'holding and working', as alleged in paragraph 8 of the complaint, of ground not validly located, segregates, or creates mining rights, anterior to the patent entry, or whether it merely entitles the one so holding to claim a patent;*"

Counsel for appellant argue that the allegations of paragraph 8 of the complaint (R., p. 4) present a Federal question in that the construction of Section 2332, Rev. Stat., is involved.

Section 2332 is a section permitting the patenting of a mining claim based upon adverse possession for a period equal to the local statute of limitations. Counsel entirely misconstrue the complaint, for the appellees

did not assert or claim that the patent to the Elm Orlu claim was issued pursuant to the provisions of Section 2332. On the contrary, the complaint does assert (pars. 11 and 12, R., p. 5) that the application for patent was based upon the location notice of the Elm Orlu attached as an exhibit to the bill. Paragraph 12 expressly alleges "that the officers of the United States Land Office accepted said proof of discovery and location and said declaratory statement."

"(3) *The extent under Section 2322, R. S., of the extralateral right in the North Branch of the Rainbow Vein north of the common side line of the two claims;*"

This involves a question of fact as to where the vein departs through the common side line of the two claims. The principle has been established by this court that a vein crossing one end line and one side line entitles the owner of the claim to that portion of the vein between the plane of the end line and a parallel plane where the apex of the lode crosses the side line.

Del Monte M. & M. Co. v. Last Chance M. & M. Co., 171 U. S. 55;
Clark v. Fitzgerald, 171 U. S. 92.

Counsel urge in this connection that it becomes necessary to determine whether or not the rights of the plaintiff extended to the north wall or the south wall of the north branch of the vein where it crossed the common side line. We concur with the statement in counsel's brief at pages 9 and 10 that that question is determined by priority of location, priority of mining rights depending on priority of location. If the Elm Orlu is prior, it takes to the south wall.

Lawson v. United States Min. Co., 207 U. S. 1.

The complaint does not show that any such question involved depends upon anything other than a question of fact. Even upon counsel's argument, the determination of these rights flows from a determination of the question of priority. The question of priority certainly does not under any allegation in the complaint depend upon the construction of the statutes of the United States. Here again counsel for appellant erroneously assumed that the interpretation of the Montana supplemental statutes presents a Federal question. *Questions* 4 *and* 5.

"(4) *The time when, under Section* 2332, *R. S., the conclusive validation by patent of an otherwise actually invalid location shall take effect with respect to extralateral rights;*

(5) *Whether, under Section* 2332, *R. S., a later patent validation of the Elm Orlu location could circumvent the previous patent validation of the Black Rock location so as to take away rights already secured by segregation to the Black Rock. Or, in other words, which patent carried the prior mining rights and the ore bodies and portions of the Rainbow vein in dispute?"*

Here again counsel attempt to infer argumentatively jurisdiction in this court. Plaintiff asserted that its rights were based upon a location, which it has at all times claimed was valid. The mere fact that it alleged that it had received a patent for that cliam does not involve and did not allege any controversy which required a construction of any statute of the United States.

To sustain the appellant's contention is to hold that where one alleges in his complaint that he owns a patented mining claim that thereby there is necessarily involved as one of the issues in the case the construc-

tion of the Federal mining laws. This has been repeatedly denied in cases involving lands other than mineral lands, and repeatedly with respect to mineral lands.

The allegation of facts showing that the plaintiff acquired the property under a grant of the United States or under a statute of the United States does not present a Federal question.

Florida Cent. & Penn. R. Co. v. Bell, 176 U. S. 321;
Shoshone Mining Co. v. Rutter, 177 U. S. 505;
Shulthis v. McDougal, 225 U. S. 561;
Norton v. Whiteside, 239 U. S. 144.

Again appellant's counsel undertake to interject into the plaintiffs' allegation of its cause of action matters which were urged by the defendant by answer and in the course of the litigation.

These two points were argued with the first three and are all based upon an erroneous premise as pointed out in our discussion of the first three points.

Questions 6 and 7.

"(6) *Whether the location-validating statute of Montana (Sections 2292-3-4, Montana Revised Code of 1907)—itself assuming to be legislation under authority of the Act of Congress—if read as attempting to validate an earlier invalid location so as to give extra-lateral rights against an intervening patent to another claim, would not violate the Fourteenth Amendment of the Federal Constitution, and the provision conferring on Congress the exclusive right of disposal of the public lands.*

(7) *Whether, if so read, it would not oppose Section 2332, R. S., as modifying the effect of a Federal Patent.*"

It is indeed difficult to understand from a reading of the complaint how counsel can seriously urge that upon the face of the complaint any such questions appear.

To maintain any such propositions reference must be made to the evidence and the rulings of the courts below, which in

Colorado Cent. C. & M. Co. v. Turck, 150 U. S. 138,

this court denied the right to do in determining its jurisdiction.

II.

SUMMARY.

Not specifically urged under any one of the claimed grounds of Federal jurisdiction, but repeatedly injected throughout the brief of appellant is the suggestion, the inference and the claim that a case which involves the extraction of ores beneath the surface of another —in other words, involving extra-lateral rights—involves a construction of the Federal mining laws, and the case of

Cheesman v. Shreve, 37 Fed. 36,

is cited. This court has determined to the contrary. The case of

Colorado Cent. C. & M. Co. v. Turck, 150 U. S. 138,

is a case which bears a striking analogy to the case at bar. The action was one in ejectment brought by Turck against the mining company in the United States Circuit Court for the District of Colorado. The complaint alleged: (1) The citizenship of the parties

and the jurisdictional amount; (2) That upon the first day of January, 1885, plaintiff was the owner and entitled to a certain mining claim which is described, together with all veins, lodes, ledges or deposits of mineral belonging thereto, as patented to him by certain letters patent of the United States; (3) That the said lode had a downward course or pitch to the northwest; that its top lay within the side lines of the plaintiff's claim, passed into adjoining land upon its downward course, and while plaintiff was so seized and possessed of said lode, the defendant afterwards and on the 1st day of Januray, 1885, wrongfully entered upon and ousted plaintiff from about 400 feet of said lode and withholds the same from the plaintiff; that the plaintiff owned the property in fee and was entitled to it, had been excluded therefrom by the defendant and that the value of rents, issues and profits amounted to $250,000. Judgment was demanded for possession, damages and costs. The case was appealed to this court and a motion was made to dismiss the appeal upon the ground that the case did not involve a Federal question. This court dismissed the appeal.

In a later case, referring to the decision in the above case, this court said:

> "*Colorado Central Consol. Min. Co. v. Turck*, 150 U. S. 138, 37 L. ed. 1030, 14 Sup. Ct. Rep. 35, was brought to this court on a writ of error to the circuit court of appeals for the eighth circuit. An action of ejectment by Turck against the mining company for possession of a certain lode mining claim had been tried in the circuit court of the United States for the District of Colorado, and determined in the plaintiff's favor. The case was taken by writ of error to the United States circuit court of appeals for the eighth circuit, and the judgment was there affirmed, and thereupon

a writ of error was allowed to this court. The case was here heard on a motion to dismiss on the ground that the suit was between citizens of different states, and that, therefore, under the judiciary act of March 3, 1891, the judgment of the circuit court of appeals was final. An attempt was made in argument to sustain the right of this court to take jurisdiction because, although the suit was between citizens of different states, yet that the solution of the disputed ownership depended upon the construction and application of sec. 2322 of the Revised Statutes concerning the dip and apex of lodes, and that hence the suit really and substantially involved a controversy only to be determined by reference to the Federal statute. But this contention did not prevail, and the writ of error was dismissed."

Blackburn v. Portland Gold Min. Co., 175 U. S. 571, 580-5.

"The validity of a statute is not drawn in question every time rights claimed under such statute are controverted, nor is the validity of an authority every time an act done by such authority is disputed."

Cook County v. Calumet & C. Canal and Dock Co., 138 U. S. 635.

Almost the precise question which is presented here was presented to this court in the case of

Empire State-Idaho Min. & Dev. Co. v. Bunker Hill & Sullivan M. & C. Co., 200 U. S. 643,

which was dismissed for want of jurisdiction in a memorandum opinion upon the authority of

Colo. Cent. Con. M. Co. v. Turck, 150 U. S. 138;

Blackburn v. Portland Gold M. Co., 175 U. S. 571;

Shoshone Min. Co. v. Rutter, 177 U. S. 505.

We have attached as "Appendix I" to this brief a copy of the complaint in the Empire State-Bunker Hill case. It discloses that the plaintiff claimed title by virtue of a patent of the United States to the Stemwinder claim. It asserted (par. VII) that the defendant claimed title to a portion of the ledge lying beyond a vertical plane drawn downward through the westerly boundary of the Stemwinder claim, and attached a map clearly showing that its claim was one to extralateral rights.

It is settled by the foregoing decisions of this court that an action brought for the purpose of determining an adverse claim to the extralateral portions of a vein apexing in the plaintiff's claim does not in itself present a Federal question.

In

Boston & Mont. Con. C. & S. M. Co. v. Montana Ore Purchasing Co., 188 U. S. 632,

it is directly held that a suit over the ownership of ore taken by the defendants from a mining claim alleged to be the property of complainant by virtue of a patent from the United States, does not present a Federal question.

The fact that it is taken from a vein apexing in the patented claim of the plaintiff, beyond the vertical boundaries of plaintiff's claim, does not under the foregoing decisions present a Federal question.

Colo. Cent. Con. M. Co. v. Turck, 150 U. S. 138;

Empire State-Idaho M. & D. Co. v. Bunker Hill & Sullivan M. & C. Co., supra.

The allegation in the complaint that defendant was the owner of the Black Rock lode mining claim, acquired by location and patent of the United States, was not essential and in any event could not interpolate into the complaint a Federal question, if one was not otherwise shown. Allegations setting forth the defendant's title or claims do not aid in the presentation of a Federal question. The Federal question relied upon as conferring original jurisdiction in a Federal court must appear necessarily by plaintiff's statement of his own cause of action and right, and cannot arise from mere allegations in the bill of the claims of the defendant.

Boston & Mont. C. C. & S. M. Co. v. Montana Ore Purchasing Co., 188 U. S. 632;

Taylor v. Anderson, 234 U. S. 74.

Counsel for appellant appreciate the force of the foregoing decisions and the principles and strenuously attempt to meet these decisive conclusions by a reliance upon the decision in

Hopkins v. Walker, 244 U. S. 486.

That case is repeatedly cited in the brief.

The necessity for relying upon that case discloses how inherently weak is the position of appellant. The case was one to remove a particular cloud from plaintiff's title. The court holds:

> "It hardly requires statement that in such cases the facts showing the plaintiff's title and the existence and invalidity of the instrument or record sought to be eliminated as a cloud upon the title are essential parts of the plaintiff's cause of action."

The court points out the two provisions of the Montana statute, the one providing for the cancellation of an instrument, apparently valid, but actually invalid, where there is reason to apprehend that if not cancelled it may prove injurious to the plaintiff, and the other permitting a suit to quiet title against an adverse claim in the absence of conditions which were formerly deemed essential. This case is of the latter class. The court says, referring to the two classes:

> "In California suits under the former are referred to as suits to remove clouds from title, while those under the latter are called suits to quiet title. * * * Of the former, it is said that it 'is aimed at a particular instrument, or piece of evidence, which is dangerous to the plaintiff's rights."

And following the California and Montana cases holds that it is an essential element of plaintiff's case to allege the facts with reference to the particular instrument of defendants which constituted a cloud.

Where the action is one to determine adverse claim, as is this case, the plaintiff is not required nor is it proper, either in California or Montana, to set forth in his bill of complaint the nature of defendant's claim or claims.

> *Woody v. Hinds,* 30 Mont. 191;
> *Devine v. City of Los Angeles,* 202 U. S. 313.

In this case, the plaintiff is not seeking to have a decree adjudging the location notice of the Black Rock or its patent to be invalid or a cloud upon the plaintiff's title, but is seeking to have adjudicated and determined all adverse claims of the defendant arising

under those instruments or in any other manner or at all. The distinction is basic and clear.

Summarized, the answer to appellant's brief may be made as follows:

(1) The state statutes supplementary to the Federal mining laws are not incorporated into the body of the Federal law and their construction does not involve a Federal question;

(2) A case involving extralateral rights does not in itself present a Federal question, even though, the rights have their foundation in the acts of Congress;

(3) The plaintiff is the one invoking jurisdiction. It is essential that the complaint show that the case should be so stated in the complaint as unequivocally to show upon the face thereof that plaintiff is seeking a determination of a question essentially arising under the Constitution or laws of the United States, the construction of which must necessarily be directly involved, or for the purpose of enforcing a right arising under the Federal law, which right had been infringed. The complaint here does not show how any right of the plaintiff under the laws or Constitution of the United States has been infringed or what controverted construction of the law exists which affects any such asserted right.

The appeal should be dismissed.

Respectfully submitted,

JOHN P. GRAY,
W. A. CLARK, JR.,
JOHN L. TEMPLEMAN,
Counsel for Appellees.

APPENDIX I.

Copy of complaint in
Empire State-Idaho Min. & Dev. Co. v. Bunker Hill & Sullivan M. & C. Co., 200 U. S. 613.

In the Circuit Court of the United States, Ninth Circuit, District of Idaho, Northern Division. In Equity.

BUNKER HILL AND SULLIVAN MINING AND CONCENTRATING COMPANY, (a Corporation), Complainant
vs.
EMPIRE STATE-IDAHO MINING AND DEVELOPING COMPANY (a Corporation), Respondents

Bill of Complaint.

To the honorable the judges of the circuit court of the United States for the ninth circuit, district of Idaho, northern division:

The Bunker Hill and Sullivan Mining and Concentrating Company a corporation created by and existing under the laws of the State of Oregon, brings this its bill of complaint against the Empire State-Idaho Mining and Developing Company, a corporation created and existing under the laws of the State of New York, as hereinafter set forth.

And thereupon your orator complains and alleges:

I.

That your orator is now, and at all times since the year 1887 has been, a corporation duly organized and existing under the laws of the State of Oregon, having its principal place of business in the city of Port-

land, in said State, and during all of said times has been, and now is, engaged in carrying on the business of mining in the county of Shoshone, State of Idaho.

II.

That the respondent, The Empire State-Idaho Mining and Developing Company, is a corporation duly organized and existing under the laws of the State of New York, having its principle place of business in the city of New York, in said State; that said Empire State-Idaho Mining and Developing Company, has heretofore been, and now is, carrying on the business of mining in Shoshone county, State of Idaho, and that said county of Shoshone is the county in said State where the principal business of said corporation is conducted; that said Empire State-Idaho Mining and Developing Company has, prior to the commencement of this action, designated a person residing in said Shoshone county upon whom process issued by authority of or under any law of said State may be served, and has filed such designation in the office of the secretary of state of the State of Idaho and in the office of the clerk of the district court of the first judicial district, in the State of Idaho, in and for Shoshone county.

III.

That your orator is now, and for a long time hitherto has been, the owner in fee in possession and entitled to the possession of that certain mine and lode mining claim situated in Yreka mining district, in the county of Shoshone, State of Idaho, known as the Stemwinder Lode claim, particularly described by metes and bounds as followes, to wit:

Beginning at a post in mound of rocks at the center of the southeastern end line of the claim; thence north 69° 40′ west, 356.85 feet to a post in mound of rocks, the southwest corner of the claim, from which a prominent rock peak bears south 8° 22′ east, and another prominent peak bears north 84° 35′ east; the northwest corner of the Bunker Hill lode bears north 69° 40′ west, 207.8 feet; thence north 12° 28′ west 619.6 feet to a post in mound of rocks, the northwest corner of the claim, from which corner No. 3 of survey No. 550 of the Emma Lode claim (which claim is hereinafter more particularly described) bears south 49° 57′ east, 121.9 feet distant; thence south 69° 48′ east, 713.7 feet to a post in mound of rocks, the northeast corner of the claim; thence south 12° 28′ east, 619.6 feet, to a stake in mound of rocks, the southeast corner of the claim; thence north 69° 40′ west, 356.85 feet to the place of beginning; excepting such portions of said Stemwinder Lode claim as above described as are included within the surface lines of those two certain mining claims known as and called respectively the Emma and the Last Chance Lode claims, as such claims are hereinafter particularly described.

The surface lines of said Emma claim are described as follows: Beginning at the point of discovery with variation of 21° 45′ east; thence north 86° 40′ west, 273 feet to corner No. 2: thence north 1° east, 114 feet to corner No. 3; thence north 82° 23′ east, 1,514 feet to corner No. 4; thence south 1° west, 560 feet to corner No. 1; thence north 80° 40′ west, 1,513 feet to corner No. 2, the place of beginning, the survey of exterior boundaries; embracing an area of 11,584 acres. From corner No. 2 U. S. mineral monument No. 1 bears north 57° 43′ west, 9,023 feet distant.

The surface lines of said Last Chance Lode claim are described as follows:

Beginning at a pine tree marked "West center end of Last Chance Lode claim," thence running along the west end line north 3° 33′ east, 300 feet to a stake 6 inches square and 4 feet high marked corner No. 1, survey No. 551; thence running along the north side line north 87° 18′ east 1500 feet to a post 6 inches square and four feet high marked corner No. 2, from which corner No. 3 of survey No. 546 bears north 41° 40′ west, 385.8 feet distant; thence running along the east end line of the Last Chance Lode claim south 3° 33′ west, 516 feet to a post 6 inches square and 4 feet high marked corner No. 3, survey No. 551; thence running along the south side line south 88° 4′ west, 1498 feet to a post 6 inches square and 4 feet high marked corner No. 4, survey No. 551; thence running along the west end line north 3° 33′ east 196 feet to the west center end post, the place of beginning.

And also excepting such parts of the lode or vein which has its top or apex within said Stemwinder Lode claim as hereinafter set forth, which lies within said Emma Lode claim and said Last Chance Lode claim which is found within the surface lines of said two claims last above named, and such underground parts of said vein as lie between planes drawn downward through the end lines of said Emma and Last Chance claims, and such end lines, produced as hereinafter particularly set forth.

Attached hereto and made a part of this bill of complaint is a diagram marked Exhibit "A," whereon *is* correctly delineated the surface boundaries of said Stemwinder, Emma and Last Chance Lode claims, and the course of the apex of said vein at the surface through said claim as hereinafter described.

IV.

Your orator further avers that within said Stemwinder, Emma and Last Chance Lode claims is a vein or lode of rock in place carrying silver, lead and other valuable minerals. The general course of the top or apex of said vein or lode at the surface within said claims is northwesterly and southeasterly. On its course the top or apex of said vein crosses the southerly boundary line of said Stemwinder Lode claim, which line is the one described hereinbefore as having a course north 69° 40′ west connecting the southeast and south west corners of said Stemwinder Lode claim. Thereupon the course or apex of said vein crosses on its northwestwardly direction, successively, the following boundary lines of said respective claims, to wit: the southeasterly boundary of the Emma Lode claim, which line is the one hereinbefore described as having a course north 80° 40′ west, 1513 feet in length, connecting corners Nos. 1 and 2 of said Emma Lode claim; the northern boundary line of the Stemwinder Lode claim, which line is the one described hereinbefore as having a course south 69° 40′ east, 713.7 feet in length, connecting the northeast and northwest corners of said last named claim; the southeasterly boundary line of the Last Chance claim, which line is the one described hereinbefore as having a course south 88° 4′ west, 1498 feet in length connecting corners Nos. 3 and 4 of said claim; the northwesterly boundary line of the Last Chance Lode claim, which line is the one described hereinbefore as having a course north 87° 18′ east, and a length of 1500 feet connecting corners Nos. 1 and 2 of said claim. As hereinbefore alleged, the position and course of the apex of the vein at the surface traversing the respective claims

hereinbefore described, and crossing their respective boundaries, *is* correctly delineated in said Exhibit "A" hereto attached and made a part of this bill of complaint.

The downward course of said vein is westwardly, as indicated by the arrows marked in said Exhibit "A." On its said downward course, between the end lines of said Stemwinder Lode claim, said vein passes out of and extends indefinitely beyond a vertical plane drawn through the western boundary line of the Stemwinder Lode claim, which said line is the one hereinbefore described as having a course north 12° 28′ east, and a length of 619.6 feet, connecting the southwest and northwest corners of said claim, and also on such downward course passes out of and extends indefinitely and beyond vertical planes drawn respectively through the northwesterly boundary line of the Emma Lode claim, being the line hereinbefore described as connecting corners Nos. 3 and 4 of said claim, and a vertical plane drawn through the northwesterly boundary line of the Last Chance claim, being the line connecting corners Nos. 1 and 2 of said claim, and a vertical plane drawn through the westerly boundary line of said Last Chance being the line connecting corners Nos. 4 and 1 of said claim.

And your orator avers that for many years last past your orator has been and now is the owner in fee, in the possession and entitled to the possession of all that portion of the surface of said Stemwinder Lode claim which contains the apex of said Stemwinder vein save and except such portions of said surface as are embraced within said Emma and Last Chance claims, and at all of said times has been and now is the owner in fee, in possession and entitled to the possession of all said vein throughout its entire depth which on its

downward course between the end line planes of said Stemwinder Lode claim passes out of and extends indefinitely beyond a vertical plane drawn through the western boundary of said Stemwinder claim, save and except only such underground parts of said vein as are embraced within the planes drawn through the end lines of said Emma Lode claim and such end lines produced southwestwardly to their intersection, and save and except such underground parts of said vein as are embraced between vertical planes drawn through the end lines of the Last Chance claim and such end lines produced indefinitely in their own direction.

VII.

Your orator further avers that the respondent claims an estate or interest adverse to complainant in and to said Stemwinder Lode claim and in and to such part of said Stemwinder vein as lies westerly of and beyond a vertical plane drawn downward through the westerly boundary line of said Stemwinder Lode claim, and which lies northwestwardly of and beyond a vertical plane drawn downward through the northwesterly boundary line of said Last Chance mining claim, and which lies between vertical planes drawn downward through the end lines of said Stemwinder Lode claim as hereinbefore described, and such lines extended indefinitely in their own direction westwardly, and beyond a vertical plane drawn through said Last Chance northwesterly boundary line. But your orator avers that the claims of said respondent is false and groundless and is a cloud upon your orator's title; that said claim is without any right whatever; said respondent has no right, title, estate or interest whatever in or to said Stemwinder Lode claim, or in or to said Stemwinder lode or any part thereof.

VIII.

And your orator further shows that the Stemwinder Lode claim hereinbefore described and alleged to be owned by and in the possession of your orator is of great value, to wit, one hundred thousand dollars, exclusive of interest and costs. The value of said part of said Stemwinder lode or vein which lies northwesterly of a vertical plane drawn through the northwesterly boundary line of the Last Chance Lode claim, and between the vertical planes drawn downward through the end lines of the Stemwinder claim produced beyond their intersection with the plane drawn through such boundary line of said Last Chance claim, exceeds in value the sum of fifty thousand dollars, and that portion of said vein to which said respondent wrongfully asserts title and claim as hereinbefore alleged, exceeds in value the sum of fifty thousand dollars, exclusive of interest and costs.

IX.

Your orator further complains and alleges that heretofore and since September 1st, 1899, said respondent Empire State-Idaho Mining and Developing Company has by means of underground works in its exclusive possession and control penetrated into and upon that part of said Stemwinder vein to which it asserts some right, title or interest, to wit, that part of said vein which lies northwestwardly and beyond a vertical plane drawn downward through the northwesterly Last Chance boundary and between vertical planes drawn downward through the end lines of said Stemwinder claim produced beyond their intersection with said Last Chance mining claim. That your orator has no means of access to said part of said vein. That the under-

ground works of said respondent cut and intersect said vein which contains large and valuable ore bodies containing lead and silver. And said respondent threatens to and will, unless restrained by the order of this court, extract and remove from said vein, the property of your orator, and convert to their own use large quantities of mineral deposits, rocks and ores therein bearing silver and other precious metals. And said respond threatens to and will, unless restrained by order of this court, extend its present workings in and upon said vein, and will take from said vein and mining ground the entire value thereof, to the great and irreparable injury of your orator.

And your orator further shows and avers that unless the said respondent, its agents, servants and employees are restrained and enjoined from intruding and trespassing upon said mining ground and vein, and making cuts, openings and excavations therein, and digging up, extracting, removing and carrying away from said mining ground and vein said mineral deposits, earth, rock and ores therein bearing silver, lead and other precious metals, the value and substance of said mining ground will be destroyed and the complainant will suffer irreparable injury.

In consideration whereof, and forasmuch as your orator is entirely remediless in the premises at and according to the strict rules of the common law, and can have relief only in a court of equity where matters of this nature are properly cognizable and reviewable, and to the end that respondent may appear and answer all and singular the matters in the bill complained of, but without oath to such answer, your orator expressly waiving the oath of respondent, your orator prays that said respondent may be required to set forth the nature of its claim, and that all adverse claims of said respond-

ent may be determined by decree of this court; that by said decree it be declared and adjudged that said respondent has not any estate or interest whatsoever in or to said Stonewinder Lode claim or in or to any part or portion of said Stonewinder vein or lode as hereinbefore described; and that by said decree it be declared and adjudged that the title of your orator thereto is good and valid, and that said respondent be enjoined and forever restrained from asserting any claim whatsoever in or to said Stonewinder Lode claim, or in or to said Stonewinder lode or vein adverse to your orator.

And to the end that said Empire State-Idaho Mining and Developing Company, its agents, servants and employees, may be restrained from further penetrating in and upon said Stonewinder vein during the pendency of this action, and from extracting and removing from said vein any ore, earth or rock in place, May it please your honors to grant your orator a writ of injunction pending this action, issuing out of and in accordance with the rules and practice of this honorable court to be directed to respondent Empire State-Idaho Mining and Developing Company, to restrain it, its servants, agents and employees, from entering into or upon the mine, mining ground, lode or vein, property and premises hereinbefore particularly described and designated as the property of your orator, and from working or mining thereon, or making or continuing any cut, opening, or excavation on or in said vein or lode or mining ground, or on or in any part thereof, or digging up, extracting or removing from said mining ground or from any part thereof any mineral deposit, ore, rock, or any mineral substance whatever; also for a restraining order to the same effect until an application can be heard.

Your orator prays for such other and further relief as shall be meet and agreeable to equity and for costs of suit.

May it please your honors to grant unto your orator a writ of subpoena of the United States of America directed to said respondent Empire State-Idaho Mining and Developing Company directing it to appear on a day certain and answer unto this bill of complaint and to abide—and perform the order and decree of this court.

BUNKER HILL & SULLIVAN MINING AND CONCENTRATING COMPANY,
By A. BURCH, Manager.

LINDLEY & ECKHOFF,
McBRIDE & FOLSOM,
Solicitors for Complainant.

CURTIS H. LINDLEY, Counsel.

STATE OF WASHINGTON, }
County of Spokane, } ss:

On this 19th day of May, 1902, before me personally appeared A. Burch, who made solemn oath that he is an officer, to wit, the manager, and the agent and attorney in fact of the complainant corporation in the above cause. That he has read the foregoing bill of complaint and knows the contents thereof, and that the same is true of his own knowledge, except as to the matters therein stated on information and belief, and as to those matters he believes it to be true.

[SEAL] BURTON J. ONSTINE,
Notary Public in and for the State of Washington
Residing at Spokane.

(Endorsed:) No. 270. United States circuit court, district of Idaho, northern division. Bunker Hill and Sullivan Mining and Concentrating Company, a corporation, complainants, *vs.* Empire State-Idaho Mining and Developing Company, a corporation, respondent. Bill in Equity. Filed May 21st, 1902. A. L. Richardson, clerk.

No 175.
C.C.S.M.R.C. p. 169
&
C.M.L.M. Cases

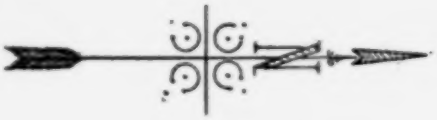
(Original Ex A. attached to Bill of Complaint

No 895

U.S. CIRCUIT COURT OF APPEALS
FOR THE NINTH CIRCUIT.

EXHIBIT

Received SEP 19, 1902
F. D. MONCKTON, Clerk.
By MEREDITH SAWYER
Deputy Clerk.



Scale 500 feet to one inch

Exhibit A